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NO. 16816

United States
COURT OF APPEALS
for the Ninth Circuit

PORTLAND BASEBALL CLUB, INC., an Oregon corporation,

Appellant,

vs.

FORD C. FRICK, COMMISSIONER OF BASEBALL, et al,

Appellees.

APPELLANT'S BRIEF

Appeal from the United States District Court for the District of Oregon.

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Appeal from the United States District Court for the District of Oregon.

BASIS OF JURISDICTION

Plaintiff filed this suit (R. 3) to recover damages and certain equitable relief for violations of the Sections 15 and 26 of Title 15 U.S.C., being part of the act of Congress of July 2, 1890, entitled "AN ACT TO PROTECT TRADE AND COMMERCE AGAINST UNLAWFUL RESTRAINT AND MONOPOLY," as amended, and commonly known as the Sherman Act and Clayton Act.

The action is to recover damages and equitable relief against the defendant for injuries to the plaintiff in its business of conducting exhibitions of baseball in Portland, Oregon, and in seven other cities constituting the Pacific Coast League, which injury proximately resulted from defendant's violation of anti-trust laws of the United States. The complaint alleges that the defendants herein have continuously engaged in and transacted business in the State of Oregon by their scouting activities, by their ownership of clubs that participate in the Pacific Coast League and particularly in Portland, Oregon, by working agreements in the same manner, by the televising of baseball games into the State of Oregon and by subsidizing of clubs by the defendants in the State of Oregon (R. 4-9).

On December 14, 1959, the Honorable Gus J. Solomon, Judge of the District Court, entered an order dismissing plaintiff's complaint for want of jurisdiction (R. 81). On the 5th day of January, 1960, plaintiff filed its Notice of Appeal (R. 83). This Court has jurisdiction by virtue of the provisions of 28 U.S.C.A., Sec. 1291.

STATEMENT OF CASE

This is a suit based upon the violations of the provisions of the Sherman and Clayton Acts aforesaid. The plaintiff is one of eight teams having membership in the Pacific Coast League, a league that has been in existence for over fifty years. The complaint alleges that the plaintiff operates within the organization known as "Organized Baseball," Organized Baseball being predicated on an

agreement between the sixteen Major League Teams and the Minor League teams; said agreement being known as the "Professional Baseball Agreement" and sometimes referred to as the "Major-Minor Agreement" (R. 57-69). This agreement sets forth the conditions and obligations of the working agreements; the drafting of ball players, the number of players that each team can have and all the interworkings of baseball. The sixteen defendants, known as the Major League teams, in their organization under the Major-Minor Agreement have a rule that each club can own only forty ball players. By their monopolistic practices, the defendants have done great damage to the plaintiff in its operation of its baseball team.

The alleged monopolistic practices consist of (R. 16-31):

1. The ownership by the sixteen Major League defendants of practically all of the baseball talent and, particularly, the young baseball talent; that the plaintiff is unable to acquire young baseball talent because of the monopolistic practices of these said sixteen defendants.

2. Excessive and illegal telecasting of Major League baseball into Minor League territory in violation of the Professional Baseball Agreement, and preventing the telecasting of Major League games into Major League territory.

3. Infiltration into the Minor League organization of men paid by or under obligation to the defendants.

4. Complete domination of the Minor Leagues, not only in the acquisition of, but use, recall, buying and selling and trading of player talent.

By the aforesaid practices the plaintiff has been damaged in reduction of attendance and even though the metropolitan area of the City of Portland has become a larger area, the plaintiff is deprived of growing and satisfying the desire of said growing metropolitan area by any improved brand of baseball because of the practices of these defendants.

The plaintiff and practically all Minor League teams are in an increasingly weakened position and will continue to be so unless the practices are declared to be improper and these defendants are enjoined from their monopolistic practices.

SPECIFICATION OF ERROR

The Court erred in granting defendants' motion to dismiss plaintiff's Complaint.

SUMMARY OF ARGUMENT

The applicable statute simply states that every contract or combination, in the form of trust or otherwise, in restraint of trade or commerce among the several states is declared to be illegal. The Congress passed this law under the commerce clause; it is all inclusive and there are no exceptions. The defendants are either bound by the above-mentioned law or they are not. Other similar activities or professional sports are bound and there is no basis for distinction that would grant immunity to these defendants.

ARGUMENT

Amount of Commerce

It seems unnecessary to argue whether baseball has sufficient quantum of interstate activity to be declared to be interstate commerce. The language of the Supreme Court in *Radovich vs. National Football League,* 352 U.S. 445, is as follows, p. 451:

> "If this ruling is unrealistic, inconsistent or illogical, it is sufficient to answer, aside from the distinctions between the businesses, that were we considering the question of baseball for the first time upon a clean slate we would have no doubts."

It is generally agreed that, if the allegations against the defendants were being presented for the first time, there would be no question that the acts complained of would be subject to the Antitrust laws.

The decision of Justice Holmes in *Federal Baseball Club v. National League,* 259 U.S. 200, however has been interpreted to give baseball immunity. The decision has been adhered to only as to baseball, but not any other sport or entertainment, whether team or individual. (*U.S. v. Shubert,* 348 U.S. 222; *Toolson v. New York Yankees,* 346 U.S. 356; *U.S. v. International Boxing Club,* 348 U.S. 236; *Radovich v. National Football League,* 352 U.S. 445.)

Analysis of Toolson Decision

The Supreme Court in this decision reaffirmed its earlier holding that professional baseball is not subject to the Anti-trust laws.

The Court observed that subsequent to the *Federal Baseball* decision, which established this sport's exemption from the Anti-trust laws, on p. 357:

> "Congress has had the ruling under consideration but has not seen fit to bring such business under these laws by legislation having prospective effect. The business has thus been left for thirty years to develop, on the understanding that it was not subject to existing anti-trust legislation."

"Without reexamination of the underlying issues," the court reaffirmed its holding in the *Federal Baseball* case, "so far as that decision determines that Congress had no intention of including the business of baseball within the scope of Federal Anti-trust laws."

Mr. Justice Burton dissented from this holding and Justice Reed concurred with him. These Justices were of the opinion that organized baseball is now engaged in interstate commerce and, therefore, subject to the Anti-trust laws. The dissenting Justices said on p. 357:

> "* * * in the light of organized baseball's well known and widely distributed capital investments used in conducting competitions between teams constantly traveling between states, its receipts and expenditures of large sums transmitted between states, its numerous purchases of materials in interstate commerce, the attendance at its local exhibitions of large audiences often traveling across state lines, its radio and television activities which expand its audiences beyond state lines, its sponsorship of interstate advertising, and its highly organized 'farm system' of minor league baseball clubs, coupled with restrictive contracts and understandings between individuals and among clubs or leagues playing for profit throughout the United States and even Canada, Mexico and Cuba, it is a contradiction in terms to say that the

> defendants in the cases before us are not now engaged in interstate trade or commerce as those terms are used in the Constitution of the United States and in the Sherman Act, * * *"

Professional baseball, stated Justices Burton and Reed, "is interstate trade or commerce and, as such it is subject to the Sherman Act until excepted."

The *Toolson* case relied on the *Federal Baseball* case. If it is good law, it must be because the earlier case is good law.

Therefore, since this famous decision is the basis for the Supreme Court's latest decision on baseball, the case should be carefully reviewed to see (1) if the Court intended all the immunities read into that decision and (2) if the decision is a sound one and one that should be followed?

Analysis of Federal Baseball Case

As to point number 1, it is seriously urged that Justice Holmes did not intend his decision to be so all embracing as to exclude baseball regardless of how big or how extensive its operation became.

In the case of *Hart v. Keith Vaudeville Exchange,* 262 U.S. 271, which was handed down just a year later, it seems that Justice Holmes was intending to limit and restrict his remarks of a year earlier.

In the *Hart* case the plaintiff sought relief of the court prior to the decision of the United States Supreme Court in the *Federal Baseball* case against an alleged conspiracy

of theatre owners engaged in the business of getting contracts for vaudeville actors to perform throughout the United States and of acting as their managers and personal representatives, alleging that the business involved contracts not only for travel of performers from state to state and from abroad, but also for transportation of vaudeville acts including performers, scenery, music, costumes, etc., resulting in a constant stream of commerce from state to state, in which plaintiff claimed the apparatus transported was not a mere incident, but sometimes more important than the performers.

The Court held that the case came within the Anti-trust Act, and, on page 274, stated: "The bill was brought before the decision of the *Baseball Club* case, and it may be that *what in general is incidental, in some instances may rise to a magnitude that requires it to be considered independently.*"

Thus, to construe the Holmes decision to give baseball a blanket release is not justified in light of his remarks in the Hart decision a year later.

The scope of the operation of baseball has changed immensely since 1922 (R. 12-16). The operation of farm clubs, working agreements, acquisition of players far beyond their immediate needs, an elaborate scouting system, and the transmission of the game by radio and television to all the states and some foreign countries has certainly taken baseball out of the "sport" category and made its interstate activity one of a "great magnitude." Certainly those elaborate operations cannot be described as "incidental."

We are dealing with men engaged in a professional activity at very lucrative salaries---this, too, has changed since the 1922 decision. The word "sport" is usually and originally thought of where a group of participants engaged in some athletic endeavor for the honor of their Alma Mater, their home town, etc. But now the sports angle is reduced considerably by the participants demanding and being offered the highest bid possible. Teams are shifted from week to week because, to the defendants, winning is the prime goal. Ethical standards are being shoved in the background. It is the Major League defendants who are unduly emphasizing the materialistic considerations and de-emphasizing the sportsmanship phase of the game.

It is the Minor Leagues who are truly devoted to baseball. At the present time because of the practices and activities of the defendants, a Minor League franchise is a license to lose money. But many men devoted to the wonderful attributes of the game of baseball struggle along because they firmly believe, as does the plaintiff, that baseball is a wonderful and constructive force for every community.

Professional sports can conduct themselves in such a manner that the same altruism that exists in amateur sports can be maintained, but the plaintiff and those engaged in the professional activity should not attempt to delude themselves or the courts that they are not part of the business world and not subject to the same rules as other people in the market place.

As to point number 2, — is the Federal Baseball doctrine a sound legal proposition to follow?

We believe that the decision as construed is wrong and should be overruled. Furthermore, the decisions interpreting it have extended the doctrine far beyond its original intention. Let us examine the facts of that decision.

The plaintiff and seven other baseball clubs comprised the Federal League of Professional Baseball. The Supreme Court held that, on p. 208:

> "The business is giving exhibitions of baseball, which are purely state affairs. It is true that in order to attain for these exhibitions the great popularity that they have achieved, competitions must be arranged between clubs from different cities and states. But the fact that in order to give the exhibitions the Leagues must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the character of the business. According to the distinction insisted upon in Hooper vs. California, 155 U.S. 648, 655, 15 Sup. Ct. 207, 39 L.Ed. 297, the transport is a mere incident, the exhibition, although made for money would not be called trade or commerce in the commonly accepted use of the words. As it is put by the defendant, personal effort, not related to production, is not a subject of commerce. That which in its consummation is not commerce does not become commerce among the States because the transportation that we have mentioned takes place. To repeat the illustrations given by the Court below, a firm of lawyers sending out a member to argue in a case, or the Chautauqua lecture bureau sending out lecturers, does not engage in such commerce because the lawyer or lecturer goes to any other State.
>
> "If we are right the plaintiff's business is to be described in the same way and the restrictions by contract that prevented the plaintiff from getting players to break their bargains and the other con-

duct charged against the defendants were not an interference with commerce among the States."

The following statements were made in that decision:

(1) "The decision of the Court of Appeals went to root of the case * * *" P. 208.

(2) "According to the distinction insisted upon in *Hooper v. California* the transport is a mere incident, not the essential thing." P. 209.

(3) "But we are of the opinion that the Court of Appeals was right." P. 208.

(4) "To repeat the illustrations given by the Court below * * *" P. 209.

Those statements clearly indicate that the Supreme Court adopted the reasoning of the Court of Appeals. Consequently, we must go back to decision of the Court of Appeals, 269 F. 681, and analyze that opinion to see what the reasoning and authorities are in order to determine if that decision is still good law, and also if the authorities cited are still good law.

At 269 F. 685, the Court states: "The production of the game was the dominant thing in their activities." This followed *Hooper v. California,* 155 U.S. 648, in which the Supreme Court of the United States had been asked to hold that, because an insurance corporation, in effecting a marine insurance policy, used some instrumentalities of commerce, it was engaged in that commerce. The Court had refused to yield to the argument, and said:

"It ignores the real distinction upon which the general rule and its exceptions are based, and which consists in the difference between interstate commerce, or an instrumentality thereof, on the one side,

> and the mere incidents which may attend the carrying on of such commerce on the other."

The Court held that the business of marine insurance was not commerce irrespective of the fact that some of its incidents were. (Consult also *Paul V. Virginia,* 75 U.S. (8 Wall) 168; *New York Life Ins. Co. v. Cravens,* 178 U.S. 389.) By analogy, baseball was held not to be commerce, though some of its incidents might be.

The case of *U.S. v. South-Eastern Underwriters Assn.,* 322 U.S. 533, has erased the authorities on which the Court relied and consequently the main support of the Court of Appeals decision is no longer the law.

On page 685 the Court further states: "The fact that the appellants produce baseball games as a source of profit, large or small, cannot change the character of the game. They are still sport, not trade."

The Court then goes on to cite several cases involving the booking and producing of theatrical performances, principally *In Re Oriental Society, Bankrupt,* 104 F. 975, and *People v. Klaw,* 106 N.Y.S. 341 (1907). These cases have been rendered obsolete by the *Hart v. Keith* decision, 262 U.S. 271, and *U.S. v. Shubert,* 348 U.S. 222.

On page 686 the Court states:

> "In the American Baseball Club case the precise question we are considering was passed upon in a carefully prepared opinion, and it was held that the production of exhibitions of baseball did not constitute trade or commerce. The National Agreement, the rules and regulations adopted pursuant to it and the players contracts complained of in this suit, were all considered by the Court in reaching its conclusion."

If we check that authority, *American Baseball Club of Chicago v. Chase,* 149 N.Y.S. 6, we find that it was based principally on *U.S. v. E. C. Knight,* 156 U.S. 13, also obsolete.

In the case of *People v. Klaw,* 106 N.Y.S. 341, cited by the Court of Appeals, the part of the opinion that discusses "Commerce," stresses the authority of *Paul v. Virginia, Hooper v. California,* and *N.Y. Life Ins. Co. v. Cravens*—all these authorities have been rendered obsolete.

Consequently the premise—logic—reasoning and basic foundation of the Federal Baseball case is completely undermined, and should not be followed.

The Court stated in *U.S. v. Shubert,* 348 U.S. 222:

> "At the very next term in Hart v. B. F. Keith Vaudeville Exchange, 262 U.S. 271, the Court was directly concerned with the effect of the Federal Baseball case decision on the status of the theatrical business under the Sherman Act. The complaint in the Hart case, much like the complaint here under review, alleged a conspiracy to control the booking and presentation of vaudeville acts by theatres throughout the country. * * *"

The Court thus established, contrary to defendants' argument here, that the Federal Baseball case did not automatically immunize the theatrical business from the anti-trust laws. At p. 230:

> "This Court has never held that the theatrical business is not subject to the Sherman Act. On the contrary, less than a year after the Federal Baseball decision, the Court in the Hart case put the theatrical business on notice that Federal Baseball could not be relied upon as a basis for exemption from the Anti-trust laws. * * *"

The decision of Justice Holmes has erroneously been interpreted to mean that baseball has immunity. It should be restricted to mean that baseball only was granted immunity as long as the interstate features were "incidental." Certainly the scope of "modern baseball" cannot be compared to 1920 baseball without coming to the conclusion that the same thing has happened to baseball that has happened to the corner grocer. Baseball is run on a supermarket tempo, and has all the aspects of any multi-state business.

This case involves the entire structure and procedures of baseball, including:

1. Player acquisition.
2. Elaborate nationwide scouting.
3. Transmission and control by Radio and Television.
4. Farm Club and Working Agreements throughout most of the States.
5. Related business activities on a large scale—such as concessions and leasing of stadium.
6. Control of the entire government of "organized baseball."

This is an entirely different set of facts from Federal Baseball, and the Hart case, the Shubert case and the Radovich case should be followed.

Comment on Toolson Decision

The court on page 357 states:

> "Without re-examination of the underlying issues, the judgments below are affirmed on the authority of Federal Baseball Club * * * so far as that decision

> determines that Congress had no intention of including *the business of baseball* within the scope of the federal Antitrust laws."

When the Court in *Federal Baseball* started all this immunity it restricted it as follows, 259 U.S., p. 208:

> "The business is giving exhibitions of baseball, which are plainly State affairs."

And concluded by saying, p. 209:

> "If we are right the plaintiff's business is to be described in the same way and the restrictions by contract that prevented the plaintiff from getting players to break their bargains and the other conduct charged against the defendants were not an interference with commerce among the States."

The Court was principally concerned with the question of the reserve clause in both those cases. The Court decision can be construed to be only an immunity of baseball as it was carried on at that time. Certainly the broadening of the entire base of their operations to include nation-wide activities cannot be measured by the same measuring stick as used in 1922.

To accept the construction that Toolson and Radovich give baseball blanket immunity could lead to some ridiculous and embarrassing situations. Could the defendants operate a bat factory and sell in interstate commerce and be immune? Baseball is subject to obedience under the law just as much as anyone else and to say that one activity, larger in scope than other activities, is immune and the others are not is to make a mockery out of the system of justice and bring about disrespect for such arbitrary and frivolous distinctions. How can the public

or lawyers have any faith in the consistency of enforcement of these laws or faith in the equal protection of the laws if such interpretations are allowed to continue?

Analysis of Radovich Decision 352 U.S. 445 (1957)

This action sought damages and injunctive relief testing the application of the Anti-trust laws in the business of professional football. Radovich, the plaintiff, a professional football player, contended that the members of the National Football League entered into a conspiracy to monopolize and control organized professional football and in particular caused him to be boycotted from coaching and playing for the San Francisco Clippers in the Pacific Coast League.

The United States Supreme Court held that professional football is subject to the Anti-trust laws. The majority of the Court also held that the 1922 decision in the *Federal Baseball* case was of dubious validity and the Court had only followed it in the Toolson case because, p. 450:

> "Vast efforts had gone into the development and organization of baseball since that (Federal Baseball) decision and enormous capital had been invested in reliance on its permanence."

Further, p. 450-451:

> "Congress had chosen to make no change. All this, combined with the flood of litigation that would follow its repudiation, the harassment that would ensue, and the retroactive effect of such a decision, led the Court to the practical result that it should sustain the unequivocal line of authority reaching over many years."

But the Toolson decision, said the majority, in the Radovich case, was carefully restricted to baseball and is not authority, p. 451:

> "* * * for exempting other businesses merely because of the circumstances that they are also based on the performance of local exhibitions. * * *"

The crux of the *Federal Baseball* case, according to the Radovich opinion, was the limited degree of interstate activity in baseball. But "the volume of interstate business involved in organized football places it within the provisions of the (Sherman Antitrust) Act." P. 452:

> "If this ruling is unrealistic, inconsistent, or illogical, it is sufficient to answer, aside from the distinctions between the businesses, that were we considering the question of baseball for the first time upon a clean slate we would have no doubts. But the *Federal Baseball* case held the business of baseball outside the scope of the Act. No other business claiming the coverage of these cases has such an adjudication. We, therefore, conclude that the orderly way to eliminate error or discrimination, if any there be, is by legislation and not by Court decision."

Should This Court Follow Radovich or Toolson?

The Court below took the position that neither he nor this Court could "overrule" the Supreme Court, and that he must therefore follow the Toolson decision in holding that baseball is exempt from the operation of the antitrust laws. We respectfully submit that, despite the attempt of the Supreme Court to distinguish the two factual situations, the Radovich decision has left nothing to be followed in the Toolson case.

The Toolson case proceeded upon the premises that

baseball had relied upon the decision in the Federal Baseball case, that substantial capital investment had been made on the assumption that the rule of that case would be followed, and that Congress, by its inaction, had demonstrated an intention to approve the rule of the Federal Baseball decision. The inaccuracy of these premises is demonstrated by the Radovich decision, because there is not a word in the Federal Baseball decision which is not as applicable to football as it is to baseball.

Thus, if professional baseball relied upon the holding that the giving of local exhibitions is not commerce, professional football and all other professional sports relied equally; if capital was invested in baseball upon the assumption that the Federal Baseball case stated the law once and for all, the same reliance applied to all other sports; and if Congress, by its inaction, approved the rule of the Federal Baseball case, it approved it as to all sports, and not merely as to baseball.

The Radovich case exposes another fallacy in the argument with reference to Congressional intent. The Toolson case stated that "The business has thus been left for 30 years to develop on the understanding that it was not subject to existing anti-trust legislation." But "existing" anti-trust legislation, as the Supreme Court has frequently held, exhausted the power of Congress to legislate. As the Court said in *Atlantic Cleaners and Dyers v. U.S.*, 286 U.S. 427, 434:

> "A consideration of the history of the period immediately preceding and accompanying the passage of the Sherman Act and of the mischief to be remedied, as well as the general trend of debate in both houses,

> sanctions the conclusion that Congress meant to deal comprehensively and effectively with the evils resulting from contracts, combinations and conspiracies in restraint of trade, and to that end to exercise all the power it possessed."

See also, *Apex Hosiery v. Leader,* 310 U.S. 469, 495; *U.S. v. Frankfort Distilleries,* 324 U.S. 293, 298, and *U.S. v. South-Eastern Underwriters Assoc.,* 322 U.S. 533, 538, 550.

The reason why Justice Holmes, in the Federal Baseball case, held that baseball was exempt from the anti-trust laws, was not that Congress, in its all-inclusive language in the Sherman Act, had failed to cover any aspect of commerce, but because baseball was not interstate commerce. Thus, following that holding, Congress could not constitutionally pass any legislation. And since, as above noted, Congress has already exhausted its power to legislate over interstate commerce, either existing anti-trust legislation covers baseball, and other professional sports, or Congress cannot constitutionally legislate with respect to them. The Supreme Court, however, has held that Congress not only can, but has, included professional sports within the scope of the anti-trust legislation, and since baseball is not exempted, it must follow that it is covered.

There is nothing in the Federal Baseball decision which holds that there is something peculiar about baseball which prevents it from coverage under the anti-trust laws no matter how big a business it becomes. It merely holds that the facts shown in that case with respect to interstate activities were incidental to the local nature of the

business. But the Radovich case establishes that such is no longer the case. Baseball has changed, and is now interstate commerce, even if it was not when the Federal Baseball decision was rendered.

Finally, if baseball is exempt from the anti-trust law, what protection is there to those elements of baseball, including plaintiff, which are not a part of the monopolistic conspiracy alleged in plaintiff's complaint? Certainly no one will argue that the states can constitutionally legislate in this area, or that they have the power to cure the evil, even if they can constitutionally affect the situation. The Supreme Court in Toolson expressed concern over the harassment of the major leagues which would follow in the wake of a reversal of the Federal Baseball doctrine, but what of the harassment of the minor leagues which continues to exist in view of the Congressional impasse on the subject? The decision in the Radovich case has not made it impossible for professional football to operate. Congress has not acted, either to exempt or include professional sports. The present situation is not only intolerable, but absurd. Since no distinction exists in the applicable statutes, for this Court to hold that the Radovich case did not overrule the Toolson decision would be to hold that there is a distinction between the game of baseball and all other games which is imbedded in the Constitution of the United States. We respectfully submit that such an intent cannot be imputed to the Founding Fathers.

Toolson was decided "without reexamination of the underlying issues." When those issues were examined,

in Radovich, the Federal Baseball decision was found to be unsound. This Court should follow the Radovich case, since it effectively overrules the Toolson decision.

Respectfully submitted,

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